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Nos. 82-1913 and 82-1951

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JOE G. GARCIA,

Appellant,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, *et al.*,

Appellees.

RAYMOND J. DONOVAN, SECRETARY OF LABOR,

Appellant,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, *et al.*,

Appellees.

On Appeals from the United States District Court for the Western District of Texas

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BRIEF FOR THE NATIONAL LEAGUE OF CITIES, THE NATIONAL GOVERNORS' ASSOCIATION, THE NATIONAL ASSOCIATION OF COUNTIES, THE NATIONAL CONFERENCE OF STATE LEGISLATURES, THE COUNCIL OF STATE GOVERNMENTS, AND THE INTERNATIONAL CITY MANAGEMENT ASSOCIATION AS AMICI CURIAE IN SUPPORT OF APPELLEES

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QUESTION PRESENTED

Whether publicly owned mass transit systems—which serve citizens' vital need for transportation and are crucial to modern cities—are a "traditional" governmental function which is protected against intrusive federal action by the Tenth Amendment.

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INTEREST OF THE AMICI CURIAE

The *amici* are organizations whose members include state, county, and municipal governments and officials located throughout the United States. *Amici* and their members have a vital interest in legal issues that affect the powers and responsibilities of state and local governments.

The question presented in this case, whether the wage and hour provisions of the Fair Labor Standards Act (FLSA), apply to municipal mass transit systems, is of paramount importance to *amici*. For urban mass transit is an essential public service forming a chief pillar of urban infrastructure, and cannot succeed as a private sector commercial enterprise in urban areas. New demographic and technological circumstances have forced state and local governments into playing the dominant role in providing this essential public service.

Moreover, the issues in this case are not only critical to urban mass transit, but are of profound consequence for the authority and functions of state and local jurisdictions. For these reasons, *amici* are submitting this brief to assist the Court in its consideration of the questions presented in this litigation.[1]

STATEMENT OF THE CASE

A. Relevant Facts[2]

Amici agree with the statement of facts set forth in the brief of appellee American Public Transit Association. In addition, *amici* wish to emphasize several facts which demonstrate the critical importance of this case for state and local governments. The emphasized facts relate both to the San Antonio mass transit system and to mass transit systems in general.

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[1] Pursuant to Rule 36, the parties have consented to the filing of this *amicus* brief. Their letters of consent have been lodged with the Clerk of the Court.

[2] References to the Record are noted as R. ——.

1. *Mass Transit Services Are Predominantly Provided by Publicly Owned Systems.*

Publicly owned transit systems provide the vast bulk of mass transit services in the United States today. In 1980, local publicly owned systems accounted for 94 percent of all riders, 93 percent of total vehicle miles, and 90 percent of total transit vehicles. American Public Transit Association, *Transit Fact Book*, 27, 43 (1981) (hereafter referred to as *Fact Book*). Moreover, mass transit is principally provided by local governments in 100 of 106 cities with a population greater than 200,000. Urban Mass Transportation Administration, U.S. Department of Transportation, *Directory of Regularly Scheduled, Fixed Route, Local Public Transportation Service in Urbanized Areas of Over 50,000 Population* (1979) (hereafter referred to as *DOT Directory*), R. 453-59.

2. *Publicly Owned Mass Transit Serves Vital Needs.*

The services that public transit systems provide are vital to the functioning of urban society. Without these systems, tens of millions of citizens would have no access to jobs, schools, hospitals, parks and recreation areas, or business and shopping districts. For example, more than 80 percent of the employees who work in central business districts in large metropolitan areas such as Chicago and New York City commute to work on public transit, *Fact Book*, *supra*, at 24, and at least two out of three passengers of the San Antonio bus system are engaged in going to or from school or a job. Affidavit of Wayne M. Cook, General Manager, San Antonio Metropolitan Transit Authority ¶ 14 (hereafter referred to as *Cook Affidavit*), R. 202.

Public mass transit systems are also critical for business development in urban areas: businesses take account of these systems in determining whether and where to locate in metropolitan areas. In San Francisco, for example, two-thirds of the businesses polled listed proximity to mass transit as an important factor in deciding

where to locate. *Fact Book, supra*, at 22. Similarly, it is estimated that the Washington D.C. subway system will stimulate $6 billion of private development by the time it is completed. *Id.*

In addition, without these publicly-owned transit systems, our nation's cities would be gridlocked by increased traffic congestion and would suffer greatly increased pollution caused by additional automobile emissions.[3]

3. *Publicly Owned Mass Transit Systems Are Particularly Necessary for the Disadvantaged, and Provide Extra Services for Special Classes of Riders.*

As is true of other governmental functions such as parks, recreation facilities and police and fire protection, anyone can use public transit services. However, the need for and use of public mass transit is particularly acute for minorities, handicapped persons, the elderly, and others who are economically disadvantaged. Thus, a survey conducted for the San Antonio Metropolitan Transit Authority (SAMTA) indicates that rush hour transit ridership is comprised of 66 percent Mexican-American or Spanish-speaking persons and 14 percent Blacks, and that 84 percent of the riders have incomes below $15,000. During nonrush hour, 88 percent of the transit riders are minority and 91 percent have annual incomes below $15,000. *Cook Affidavit, supra*, at ¶ 13, R. 202.

These percentages are not unique to the San Antonio transit system. Thus, in a mass transit case from Macon,

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[3] The Chicago Transit Authority estimates that, without public mass transit in that city, 100 miles of additional six-lane expressways and six times the parking area presently available in the downtown business district would be necessary to accommodate the increased automobile traffic. *Fact Book, supra*, at 21. Further, the American Public Transit Association calculates that, if all mass transit trips from 1970 to 1980 had been made by automobiles, America's cities would have been polluted by an additional 138,000 tons of hydrocarbons, an additional 1,360,000 tons of carbon monoxide, an additional 327,000 tons of nitrogen oxides, and an additional 46,000 tons of particulate matter. *Id.* at 37-38.

Georgia presently pending on this Court's docket, the lower court found that 94 percent of the riders of the city's publicly owned transit system are "transit captive"—live in a household having no automobile—and that 89 percent of the riders are Black, 80 percent are middle-aged, 80 percent have low incomes, and 66 percent are women. *Alewine v. City Council*, 699 F.2d 1060, 1064 (11th Cir. 1983), petition for certiorari filed sub nom. *City of Macon v. Joiner*, No. 82-1974, 51 U.S.L.W. 3884.

San Antonio, like many of its urban counterparts throughout the country, also provides extra, beneficial public services to special classes of transit riders. For example, the elderly and the handicapped ride the transit system at substantially reduced rates, bus service for shoppers in the central business district is free, and the immobile handicapped, totally dependent on transit services, are provided with special van service which picks them up at their doors and delivers them to their destinations. *Cook Affidavit, supra*, at ¶¶ 9-12, R. 200.01. Other transit systems aid handicapped riders by providing buses equipped with mechanical kneeling devices for easy boarding. Urban Mass Transportation Administration, U.S. Department of Transportation, *Financing Transit: Alternatives for Local Government* (report prepared for the Department of Transportation by the Institute of Public Administration) (hereafter referred to as *Financing Transit*) 261 (1971).

4. *Mass Transit Has Long Been Regulated By State and Local Governments.*

Because it is a critical part of the infrastructure of urban areas, mass transit has long been the subject of extensive regulation by state and local governments. See, *San Antonio Metropolitan Transit Association v. Donovan*, 557 F. Supp. 445, 447-48 (W.D. Tex. 1983). Historically, local governments have regulated fees, routes, schedules, franchises, and safety, even though the transit systems were privately owned. *Id.* at 448. For example, as far

back as 1913, Texas cities received exclusive authority from the state legislature to regulate fares and operations of vehicles used for carriage for hire. 1913 Tex. Gen. Laws, Ch. 147, § 4, at 714, *as codified*, Tex. Rev. Civ. Stat. Ann. art. 1175, §§ 20, 21 (Vernon 1963). Conversely, the federal government historically has *not* regulated local mass transit systems.

5. *Changing Conditions Made Mass Transit Unprofitable for Private Enterprise, Thus Forcing Local Governments to Provide This Vital Service.*

In the 1950's and 1960's, there was a shift in population from the cities to the suburbs, fueled in part by federal programs such as the Interstate Highway Act of 1956 and low cost housing loans of the Veterans Administration and Federal Housing Administration. See generally, *Financing Transit*, *supra*, at 3-7. An unintended consequence of these federal initiatives was a major increase in the cost of providing mass transit to an ever-expanding metropolitan area. Mass transit systems were no longer profitable and private companies began to go out of business. The situation spelled disaster for millions of citizens, particularly the "transit captive": the poor, the elderly, the handicapped and minority groups, all of whom rely on mass transit for accessibility to essential human services.

To ensure provision of these vital transport services, necessary to maintain the viability of the city itself, local governments had to go beyond regulation, and had to take over ownership of mass transit systems. See *Financing Transit*, *supra*, at 14-16. Thus, in 1959 the City of San Antonio purchased the San Antonio Transit Company and provided mass transit as a municipal service. *Cook Affidavit*, *supra*, at ¶ 2, R. 197. San Antonio, like several major American cities before it, acquired the transit company without the aid of federal funds.[4]

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[4] Seattle did the same in 1911, San Francisco in 1912, Detroit in 1921 and New York City in 1932. *See*, Affidavit of Stanley G. Feinsod, Executive Director, Policy and Programs, American Pub-

However, in response to requests from state and local governments and other entities, Congress later realized that federal assistance would be necessary to help local governments acquire transit facilities and assure the maintenance of vital municipal transport services. In 1964, therefore, Congress enacted the Urban Mass Transportation Act (UMTA). 49 U.S.C. §§ 1601 *et seq.* (1976 and Supp. V 1981).

Thereafter, mass transit systems quickly became a publicly owned function to an overwhelming degree. By 1978, 91 percent of the riders, 91 percent of the vehicle miles, 90 percent of the revenues and 87 percent of the vehicles were accounted for by publicly owned systems. *Feinsod Affidavit, supra*, at ¶ 4, R. 176. The full burden of providing essential transport services thus fell upon local governments and their publicly owned entities. The private companies simply left the business wholesale; they provided neither aid to nor competition for the public systems. The public systems were left to shoulder the entire responsibility themselves.

6. *Publicly Owned Mass Transit Systems Are Governed and Financed In the Same Way As Other Public Services Provided by Local Governments.*

After acquiring facilities from private transit systems, local governments administered them in the same way as other basic public services such as schools, parks, and hospitals. In San Antonio, for example, SAMTA is governed by a board of trustees appointed by the San Antonio City Council, the Bexar County Commissioners, and the mayors of the incorporated cities served by the system. *Cook Affidavit, supra*, at ¶ 3, R. 197. This ap-

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lic Transit Association (hereafter *Feinsod Affidavit*), at ¶ 4, R. 176. By the time the federal government began providing funds to aid local governments in purchasing mass transit systems, over half the residents of cities with a population of or exceeding 250,000 were served by publicly owned transit. See Appellee American Public Transit Association's Motion to Affirm at 11, *Donovan v. San Antonio Metropolitan Transit Authority*, 457 U.S. 1102 (1982).

pointed board regulates all of SAMTA's operations. SAMTA itself is a political subdivision of the state of Texas and its creation had to be approved in an election. *Id.* at ¶¶ 2-3, R. 196-197. Moreover, as an instrument of state government, SAMTA has authority to levy and collect taxes, issue bonds, and bring eminent domain proceedings. *Id.* at ¶ 3, R. 197. The key administrative decisions necessary to operate SAMTA are thus made by state and local government officials.

Also, local governments extensively finance transit systems in the same way they finance other basic public services such as police and fire protection, maintenance of park and recreation areas, and public health services. Financing methods used to subsidize public transit systems include general revenue, property, *ad valorem*, mortgage, parking, sales, cigarette, and earnings taxes, lottery proceeds, and bridge tolls. *Feinsod Affidavit, supra* at ¶ 8A, R. 178. See generally, *Financing Transit, supra.*

These financing mechanisms are necessary to subsidize public transit systems, which operate at a loss. For example, during SAMTA's first two fiscal years, it had an operating budget of $41.6 million, while total revenue from fares was only $10.1 million. A permanent sales tax levy of ½ of 1 percent, which the voters approved to subsidize SAMTA, provided an essential $26.8 million during these first two years to help satisfy the system's $31.5 million operational deficit. *Cook Affidavit, supra,* at ¶ 2, ¶ 6, R. 196, 198.

7. *Mass Transit Workers Are Paid Fairly.*

Despite heavy operational losses, public transit operators are paid fairly, especially in comparison to other public and private workers. Available figures show that the wages of transit operators have exceeded those of other full-time city employees and those of workers in the manufacturing and construction industries. In addition, transit wages rose by a greater percentage than the

wages of manufacturing workers and by approximately the same percentage as the wages of construction workers during the period 1950-1977.[5] Department of Labor statistics also demonstrate that transit wages are competitive with the wages of workers in the printing trades and with the earnings of truck drivers and their helpers. See, *e.g.*, Bureau of the Census, U.S. Department of Commerce, *Statistical Abstract of the United States*, Table Nos. 708, 709 (1980).

As these facts make clear, the wages of transit workers are far above the minimum hourly wages prescribed by the FLSA—the standard appellants seek to impose in this case. A 1981 government survey indicates the median hourly wage for transit operating employees was $9.01 per hour, nearly triple the then prevailing minimum wage. U.S. Department of Labor, *Union Wages and Benefits: Local Transit Operating Employees*, Table 2 at 4 (1981).

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[5] The following chart, printed in *Financing Transit* at 11, compares the earnings of transit workers, full-time city employees, and manufacturing and construction workers during 1950-1976.

COMPARATIVE TRENDS IN TRANSIT AND OTHER WAGES 1950-1977

	Amount		Percent Increase in Wages in Constant-Value Dollars
	1950	1977	
Transit, average annual wage	$3,479	$14,885	70%
Manufacturing, annualized weekly rate [a]	2,916	11,445	56
City employees [b]	3,084	13,008	68
Contract construction	3,484	14,783	71

[a] Average weekly wages multiplied by 50. This procedure overstates annual wages in manufacturing and construction, both of which, but particularly construction, are more subject to seasonal fluctuations than is transit, where employment is fairly steady.

[b] Computed average compensation for full-time employees for October multiplied by 12.

The competitive wages paid to transit workers are safeguarded by a very strategic bargaining position—vast dependence of citizens on public transit systems. A work stoppage by transit employees could cripple a city and has to be avoided if at all possible. This fact gives transit workers tremendous leverage in collective bargaining. The wages of transit workers therefore continue to rise despite cutbacks in federal financial assistance to state and local governments and lean budgets for vital public services at all levels of government.

Another major factor in the competitive wages of transit workers is that transit systems have to schedule employees' work in split shifts in order to cover peak commuter hours in the morning and evening, and the systems therefore provide "spread premium compensation" to employees who work split shifts. See Chomitz and Lave, *Forecasting the Financial Effects of Work Rule Changes*, 37 Transp. Q. 453 (1983). This factor also demonstrates the need for operational flexibility, which would be seriously impaired if the FLSA were to apply. A split shift schedule, and its effects on wages, can be exemplified as follows:

A transit employee will work a morning shift and an evening shift during peak commuter hours, with a mid-afternoon break during off-peak hours. Each shift can be four hours, with the break being four hours. Thus the workday may be spread over twelve hours, but only eight of them would involve working time.

Transit employees receive a premium rate of pay because of the spread of the workday. Thus after ten hours have elapsed, six of which have been spent working and four of which have been off-hours, the employee will receive premium compensation for the remaining two hours that he or she works.[6] Over a normal five-day work week, the employee would receive regular compen-

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[6] The level of such premium compensation varies. It can range up to one and one half times the normal rate of pay.

sation for 30 hours and premium compensation for 10 hours. Transit systems would thus compensate employees at a premium rate for one quarter of their normal work.

Imposing FLSA requirements, however, would require public transit systems to pay their employees even greater sums of money. The precise level of the increase would vary with the interrelationship of specific employment circumstances and complex FLSA requirements. But the end result would be a substantial increase in the overall wage costs of public mass transit, which is labor-intensive and already has to be heavily subsidized because it loses large amounts of money. See Chomitz and Lave, *supra*, at 456-463. The FLSA concomitantly would decrease public transit systems' flexibility to schedule work hours in a fair way that meets citizens' need for transportation without incurring prohibitive costs. Moreover, imposition of the wage and hour provisions of the FLSA could have undesirable effects on the provision of other public services by local governments, since budget priorities may have to be adjusted to make up for the increased costs of transit services.

B. The Decision Below

The Court below held mass transit is protected by the Tenth Amendment because it is a traditional governmental function. The Court found there is a long record of state concern with mass transit. 557 F. Supp. at 448. It pointed out that this concern initially was expressed through extensive state and local regulation, but now local governments have become the primary provider of mass transit services. *Id.* at 448-449, 452-453, 453-454. To rule mass transit is not a traditional governmental function, held the Court, would represent "the static historical view of state functions" eschewed by this Court in *United Transportation Union v. Long Island R. R. Co.*, 455 U.S. 678 (1982). *Id.* at 450. Nor did the Court find any principled distinction between mass transit and

other state and local activities which have received large federal grants but which this Court held to be traditional governmental functions in *National League of Cities v. Usery*, 426 U.S. 833, 851 (1976). *Id.* at 451.

The Court also recognized that mass transit benefits the community as a whole, is operated at a large loss which is primarily subsidized by state and local taxes, and, because it is unprofitable, can only be supplied by government. *Id.* at 453. Finally, the Court ruled that federal regulatory responsibility would not be eroded by declaring mass transit to be a state or local governmental function. *Id.* at 448-450. Rather, both the states and Congress have recognized that public transportation is an essential function of state and local governments. *Id.* at 451.

SUMMARY OF ARGUMENT

1. This Court has previously used a three-pronged test for determining whether a state or local activity is protected against intrusive federal action by the Tenth Amendment. Under the third prong, the activity must be a "traditional governmental function." This prong, the Court has said, "was not meant to impose a static historical view of state functions." *United Transportation Union v. Long Island R.R. Co., supra*, 455 U.S. at 686. Thus, it cannot and does not require that a function be identical to a prior activity of state or local governments. Rather, it requires only that an activity be of the same genre or type as prior ones. An activity *is* of the same genre or type if it serves the same purposes or policies as prior activities.

Were the third prong to require more—were it to require that an activity be identical to prior ones—the concept of traditional governmental function would be statically frozen as of a prior date in history, and state and local governments would be unprotected when they alter their activities to meet the changing needs of citizens.

The provision of mass transit *is* a type of function traditionally performed by state and local governments. Publicly owned mass transit systems are a vital part of the local transportation infrastructure, for which local governments have always taken significant responsibility. Publicly owned systems came into existence because private companies could no longer supply essential services needed by tens of millions of citizens, particularly the less affluent, minorities, the young and the elderly. The public systems now supply over 90 percent of all mass transit service, and have very little or no competition from private mass transit companies. Publicly owned systems help to further other traditional governmental functions, and are intended solely to serve the public good rather than to make a profit.

Furthermore, because mass transit is an activity in which local governments have now been extensively engaged for at least twenty years, it not only is a *type* of function traditionally performed by local governments, it *is* a function traditionally performed by them.

2. Appellants are incorrect in asserting that mass transit is not a traditional governmental function because "primacy" must be given to history under *LIRR*. *LIRR* specifically rejected a static historical test. But that is precisely the test appellants seek to impose here. For they ignore the history of the last twenty years, during which mass transit overwhelmingly became a governmental function rather than a private one.

Moreover, *LIRR* was quite different from this case in critical respects. In *LIRR* the service at issue, commuter railroads, was overwhelmingly provided by private companies at the time of suit. Here the service at issue is overwhelmingly provided by publicly owned systems. A'so, in *LIRR* the Court was concerned that century-old federal regulation of general railway matters and railway labor relations would be eroded, with disastrous effects upon the national economy. Here regulation

has been by state and local governments, not the federal government, and there is no danger of harm to the national economy.

3. Application of the FLSA would gravely harm significant interests of local governments. The already high costs and losses they incur in providing mass transit would be increased, and their ability to develop innovative and flexible working schedules necessitated by commuting patterns would be stifled. Harms such as these were a major reason this Court refused to countenance imposition of the FLSA in *National League of Cities v. Usery, supra.*

On the other side, there will be no impairment of federal interests if the FLSA is not applied to transit operators. The operators already receive competitive wages, have fair working hours, and possess a strategic bargaining position that ensures such wages and hours.

4. Finally, appellants are incorrect in claiming that publicly owned mass transit systems should not qualify for Tenth Amendment protection because local governments used UMTA funds in acquiring and operating transit systems.

First, this Court has ruled that if Congress intends to impose conditions upon receipt of federal grants, it must do so unambiguously, so that state and local governments will know the obligations they are assuming and can judge whether they nonetheless wish to accept the grants. *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981). The UMTA, however, does not condition its grant monies upon compliance with the wage and hour provisions of the FLSA. Indeed, when it passed the UMTA, Congress eschewed creating a body of federal labor law applicable to relations between local governments and transit operators. Moreover, San Antonio acquired its transit system even before passage of the UMTA and without federal funds.

Second, and of even greater importance, appellants' argument will gravely impair the federal nature of our system. As the federal government commonly does, appellants are relying on federal funding to justify displacement of state and local authority on a subject vital to state and local governments. But such position will vitiate federalism because the ability of the federal government to raise money through taxation and borrowing is far superior to that of state and local governments. Due to its superior financial power, the federal government grants over $80 billion annually to state and local entities. The grants are necessary to enable state and local governments to effectively carry out such essential sovereign functions as health, education, safety, police protection and roadbuilding, and are essential both to meet operating costs and to acquire vital capital facilities. Without the grants, state and local governments would be gravely hampered in performing their sovereign duties effectively.

Thus, if grants enable the federal government to displace state and local authority, then national power will be aggrandized and state and local power will be diminished across a broad range of critical state and local activities. This result undermines the constitutional plan of federalism, under which power is divided among levels of government. Huge federal grants did not deter the Court from precluding federal intrusion upon areas of state and local decisionmaking in *National League of Cities*, *supra*, and such intrusion should not be allowed here either.

ARGUMENT

I. Publicly Owned Mass Transit Systems Are A Traditional Governmental Function

A. Introduction

In prior cases this Court has said a three-pronged test must be satisfied before a state or local activity is protected by the Tenth Amendment. See, *e.g.*, *Hodel v. Vir-*

ginia Surface Mining and Reclamation Assn., Inc., 452 U.S. 264 (1981). The three prongs are that (1) challenged federal action must regulate the states *qua* states, (2) the federal action must affect a matter which is an indisputable attribute of state sovereignty and (3) the federal action must "directly impair the states' ability to structure integral operations in areas of traditional governmental functions." *Id.* at 287-288.

In addition, the Court has said that even if each of these prongs is met, the state or local interest may still have to submit to federal power if the federal interest is strong enough.

Finally, in explaining the third prong of the foregoing test—the "traditional governmental function" prong—the Court has emphasized that the purpose of this prong is to determine whether the ability of states to fulfill their role in the Union is being impaired. *United Transportation Union v. Long Island Railroad Company*, *supra*, 455 U.S. at 686, 687.

Amici, who represent the governors, state legislators, cities and counties of this nation, have grave reservations as to whether the three-pronged test provides satisfactory criteria for determining whether state and local power is protected under the Tenth Amendment.[7] However, it is

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[7] The test inherently creates serious intellectual and practical difficulties, and it seems to be extraordinarily hard for state and local power to survive under it. See, *e.g.*, *Equal Employment Opportunity Commission v. Wyoming*, —— U.S. ——, 103 S. Ct. 1054 (1983); *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742 (1982); *United Transportation Union v. Long Island R.R. Co.*, *supra*; *Hodel v. Virginia Surface Mining & Reclamation Assn.*, *supra*; *Dove v. Chattanooga Area Regional Transportation Authority*, 701 F.2d 50 (6th Cir. 1983); *Kramer v. Newcastle Area Transit Authority*, 677 F.2d 308 (3d Cir. 1982), *cert. denied*, —— U.S. ——, 103 S. Ct. 786 (1983); *Alewine v. City Council*, *supra*. The test thus results in progressive and vast centralization of power in the federal government, with a concomitant and serious diminution in the governing power of state and local governments. Such centralization and diminution is a result eschewed by the constitutional

unnecessary to deal with this question here. For even if the three-pronged test is applied, publicly owned mass transit systems qualify for immunity from federal wage and hour regulation. In this regard, it is crucial to note that the first two prongs of the test are not even at issue here. Rather, all parties have conceded these two prongs are met: it is conceded that the challenged federal wage and hour regulation is here being applied to states as states and addresses a matter—the wages and hours of government employees—which is an indisputable attribute of state sovereignty.

Concession on these points is well founded. For in *National League of Cities, supra*, this Court already conclusively determined that application of the FLSA to the states and their political subdivisions is a regulation of the "States as States." 426 U.S. at 845. Equally, the Court determined that the "States' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those persons will work, and what compensation

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plan of federalism, under which power is to be shared among levels of government.

Because of *amici's* views on this subject, *amici* have and will continue to point out specific weaknesses in each of the three prongs as appropriate cases arise in this Court. See, *e.g.*, *Brief Of The Council of State Governments, The National Conference of State Legislatures, The National Association of Counties, The National League of Cities, The International City Management Association, and The United States Conference of Mayors as Amici Curiae In Support Of a Plenary Hearing and Reversal of the Decision Below, State of Connecticut et al. v. United States of America, et al.*, No. 83-870, O.T. 1983. *Amici* will further urge that a better criterion of state and local power under the Tenth Amendment is whether challenged federal action harms the ability of state and local governments to fulfill their role in the Union. This criterion, of course, was initially presented by the Court in *LIRR, supra*. *Amici* will also urge that an additional criterion of state and local power is whether the state and local interest is heavily outweighed by the federal interest because of constitutional or practical reasons. Here again, the advocated measure of power was initially presented by this Court, this time in *Hodel, supra*.

will be provided where these employees may be called upon to work overtime," are "undoubted attribute[s] of state sovereignty." *Ibid.*

Thus, the only question in this case under the three-pronged test is whether publicly owned mass transit is a traditional governmental function, a question we address below. Additional questions are whether imposition of the FLSA will harm the ability of local governments to effectively carry out their role in the Union, and whether the federal interest in applying the FLSA here is so strong that it necessitates submission of the local governments' interests. These questions, too, are addressed below.

B. Publicly Owned Mass Transit Systems Are a Type of Function Historically Performed By Local Government

1. In *LIRR*, *supra*, this Court ruled that "emphasis on traditional governmental functions and traditional aspects of state sovereignty was not meant to impose a static historical view of state functions." 455 U.S. at 686. Rather, the purpose was to determine whether a federal regulation will hinder a state "government's ability to fulfill its role in the Union," or will "undermine the role of the states." *Id.* at 686, 687.

Because the traditional governmental function test does not impose a "static historical view," it cannot and does not require that a function be identical to a prior activity of state and local governments. Rather, it demands only that an activity be of the same genre or type as those previously performed by such governments. An activity *is* of the same genre or type if it serves the same purposes and policies as prior activities.

Were the test to require more than this—were it to require identity of activities—the concept of traditional governmental function would be static and frozen as of a prior date in history. To the vast detriment of themselves

and their citizens, state and local governments would be unprotected against intrusive federal action if they altered their activities or adopted new methods and techniques to meet the changing needs of citizens. Though technology, demographics, economic facts and other relevant factors were altered, the protected functions of state and local governments could not change. The effectiveness of the governing power of state and local governments would progressively diminish, and the power of the federal government would progressively increase. Contrary to our constitutional plan of federalism, power would ever-increasingly be centralized in the national government.

None of this is an idle or academic problem. Rather, the problem is a crucial one. For state and local governments have often had to begin providing new services needed by citizens because of changes in technological, demographic and economic facts. Over time such new services have already included public schools, hospitals, fire departments, sanitation facilities, mass transit, airports, and other necessities of modern life. And there can be no telling what new services might be required in the future.

If they are to fulfill their constitutional and governmental roles, state and local governments must be free to perform new activities and adopt new methods as circumstances require, free of debilitating federal action. We thus reiterate our central point: The traditional governmental function test does not require that a state or local activity be identical to prior ones. At most, it demands only that an activity be of the same genre or type as ones previously performed by state or local governments.

2. The provision of mass transit *is* of a genre traditionally performed by state and local governments. Traditionally, these governments have provided citizens with essential infrastructure public services which cannot be or are not being provided by private enterprise, *e.g.*, police and fire protection, roads, and sewage treatment

plants. Indeed, there are essential services which this Court has acknowledged to be traditional governmental functions even though they are provided by private enterprise as well as by government, *e.g.*, schools and health facilities. *National League of Cities, supra*, at 851. Also, as this Court expressly took pains to point out just last term in *Jefferson County Pharmaceutical Assn. v. Abbott Laboratories*, —— U.S. ——, 103 S.Ct. 1011, 1047 n.7 (1983), the provision of services required by the needy "is a traditional concern of state and local governments."

Under these criteria, mass transit is the type of function historically performed by local governments. Local mass transit systems are a vital infrastructure service. Publicly owned systems came into existence because private companies could no longer provide this essential service, but its continuation was crucial to vast numbers of citizens and to the economic and environmental health of urban areas. The extent of the total transit service provided by publicly owned systems quickly grew to overwhelming proportions—to far greater proportions than the service provided by acknowledged traditional governmental functions such as publicly owned hospitals and universities. Because they provide an overwhelming percentage of the service, publicly owned transit systems have no competition from private companies in most areas and very little in others.[8] And publicly owned

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[8] The Department of Transportation directory of urban transit systems lists SAMTA's only competition as two vehicles belonging to Trailways, Inc. *DOT Directory, supra* at 8, R. 457.

In his brief, appellant Garcia argues that holding mass transit to be a traditional governmental function will give such transit an advantage that will stifle competition in transit services and will encourage governments to take over other businesses. The argument is contrary to facts, highly speculative, and simply wrong.

In the mass transit field there is very little if any competition from private companies. See generally, *DOT Directory, supra*. Indeed, publicly owned transit arose precisely because private companies no longer wished to be in the field. Nor will a decision favorable to publicly owned mass transit encourage governments to

mass transit systems predominantly serve the needs of less affluent and otherwise needy members of society. For these reasons, publicly owned mass transit is a paradigm of the type of activity traditionally engaged in by state and local governments.

Indeed, it is appropriate to go further. Because mass transit is an activity in which local governments have now been heavily engaged for at least twenty years, it not only is the *type* of activity traditionally performed by these governments, it *is* an activity traditionally performed by them.[9]

3. There are several additional reasons why publicly owned mass transit carries out longstanding purposes and policies of local governments, and at minimum is the type of function traditionally performed by them:

a. Because they are crucially concerned with ensuring an adequate local transportation infrastructure, state and local governments have facilitiated the public's need for transportation "from time immemorial." See *Molina Estrada v. Puerto Rico Highway Authority*, 680 F.2d 841, 845 (1st Cir. 1982). Prior to owning mass transit systems, these governments aided the transportation infrastructure by building and maintaining roads. This previously was a sufficient involvement, but such a limited role is no longer practical. For private transit com-

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take over businesses which are largely and satisfactorily private. Not only is there a complete absence of data to suggest such a result, but factors which now make mass transit a governmental function would not exist in such cases. Finally, as shown by the existence of private schools, private hospitals, private garbage collectors, and even private fire departments, when a field is one in which economic and technological conditions make it intrinsically possible to earn a profit, private companies can exist and thrive even though government bears responsibility for providing a basic service.

[9] Indeed, a number of large and small cities have been heavily engaged in providing mass transit services for much longer than the last twenty years. And more recently, of course, mass transit has been not just heavily but overwhelmingly provided by local governments.

panies have gone out of business as metropolitan areas expanded and costs skyrocketed. Nor can enough highways be built to carry people in private automobiles. There is insufficient land for such construction, to say nothing of funds. Moreover, even if enough new roads could be developed, they would be of little benefit to the "transit-captive," who lack access to private cars. Thus, public mass transit is the only feasible alternative for many American citizens. It is essential to the existence of the modern city, and enables a local government to meet the public's basic transportation needs.

b. Mass transit also furthers other traditional governmental functions. For example, many of SAMTA's riders are persons for whom the government would have to provide substitute services if there were no public transit system. Millions of riders in 1978 and 1979 were students of the Bexar County and Fr. Sam Houston Independent School Districts on their way to school. *Cook Affidavit, supra*, at ¶ 8, R. 199. If there were no public transit system, these school districts would have to hire additional drivers and buses to provide transportation. Another large class of riders is the elderly, *id.* at ¶ 9, R. 200, who have limited mobility. If it had no mass transit system, San Antonio would have to provide them with meals on wheels programs when food shopping becomes too difficult and medicab programs when transportation to doctors and public health centers becomes otherwise unavailable.

The substitute services which San Antonio would have to provide for school children and the elderly would be traditional governmental functions under the local government's power to provide schools and to promote the public health and welfare. Since it serves the same purposes and policies as such traditional functions, a centralized public mass transit system serving the city's school, health and welfare goals, as well as other governmental goals, should itself be considered a traditional governmental function.

Finally, most peak hour riders are commuting to and from work. There is a strong governmental interest in making it possible for members of the work force to get to their places of employment. This interest is kin to the longstanding state and local interest in promoting local employment and the local economy by such measures as tax abatements to industry for locating in an area.

c. Publicly owned mass transit is intended to serve the public good, not pecuniary gain. Like other traditional governmental functions, and unlike private business, it is not a commercial enterprise and does not make money. Indeed, the federal government estimates that, by 1985, annual deficits for public mass transit could reach as high as $4.6 billion. *Financing Transit*, *supra*, at 19.

Rather than being a commercial enterprise, mass transit fills a public need that the private sector no longer can fill—universal transportation services at a low price. No one but SAMTA, for example, would provide the efficient, free El Centro downtown bus service for shoppers and office workers, as well as special services at greatly reduced fares for the elderly.

C. The Long Island Railroad Case Provides No Support for Appellants

Though provision of mass transit is the *type* of function traditionally performed by state and local entities, and at least during the last twenty years has *been* a function traditionally performed by local governments, appellants claim it cannot meet the traditional function test. Relying on *LIRR*, *supra*, they say that "primacy" must be given to history, *Brief for the Secretary of Labor*, p. 25, and that historically mass transit systems were owned by private companies.

LIRR does not support defendants, however. To begin with, it rejected a static historical test. But that is precisely the kind of test defendants seek to apply. For in seeking to give "primacy" to history, appellants overlook the history of the last twenty years, during which mass

transit became so overwhelmingly supplied by governments rather than private companies that by 1980 publicly owned systems accounted for 94 percent of all riders, 93 percent of total vehicle miles, and 90 percent of total transit vehicles. Unless history must be frozen as of the start of the Johnson administration in 1963, the historical record of the last two decades belies appellants' claim that the "primacy" of history demands judgment for them.[10]

The historical record of the last two decades also undercuts defendants' effort to find a factual similarity between this case and *LIRR*. For when it said in *LIRR* that "[o]peration of passenger railroads" such as the commuter line involved there "has traditionally been a function of private industry, not state or local governments," the Court immediately added the rather pertinent fact that "[a]t the time of this suit, there were 17 commuter railroads in the United States; only two of those railroads were publicly owned and operated, both by the Metropolitan Transportation Authority." *United Transportation Union v. Long Island R.R. Co.*, *supra*, 455 U.S. at 686, 686 n.12. A situation in which only 2 of 17 commuter lines were owned by a public entity is worlds apart from one in which public entities all across the nation now provide over 90 percent of the service.

Finally, there also is another highly important distinction between this case and *LIRR*. In *LIRR* the Court pointed out at length that railroads had been "subject to pervasive federal regulation" under the Interstate

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[10] Though the Secretary of Labor argues for the "primacy" of history, even he is forced to concede that a new technological development can create a protected governmental function. *Brief for the Secretary of Labor*, at 25. However, he denies that new economic or demographic developments can create the same status, at least not where a technology was initially employed by private enterprise. The Secretary's position lacks any sensible basis. As mass transit exemplifies, changes in demographic and economic facts can require government to undertake a function just as surely as technological change.

Commerce Act "for nearly a century," and that federal regulation of railroad labor relations had begun only one year after the Interstate Commerce Act was passed. *United Transportation Union v. Long Island R.R. Co.*, *supra*, 455 U.S. at 687-688. The Court felt this uniform and long-standing federal regulation of railway matters was essential to the rail system and the national economy, which could be greatly harmed by crippling rail strikes if federal law were inapplicable. Because of this view, the Court was greatly concerned lest there be nationally harmful erosion of the broad and historic federal regulatory authority over railroad operations in general and railway labor relations in particular. *Id.* at 688-689.

But no comparable situation exists here. There has been no pervasive overall federal regulation of mass transit—regulation of transit was instead supplied by state and local governments. As well, the federal effort to regulate the wages and hours of transit operators is only of recent vintage, as shown by appellants' own briefs, and is not critical to the health of the economy. Thus, there will be no improper erosion of federal regulation here nor any danger to the national economic system.[11]

II. Application of the FLSA to Publicly Owned Mass Transit Would Harm the Ability of Local Governments to Fulfill Their Role and Is Not Justified By Any Federal Interest

Application of the FLSA to publicly owned transit systems would harm the ability of local governments to fulfill their governmental role of providing mass transit services. Nor does the federal government have an interest in application of the FLSA that would outweigh, and

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[11] Any supposed danger to the national economy stemming from lack of federal control over transit operators is further belied because *National League of Cities* has already exempted far larger numbers of state and local employees from federal wage and hour regulation. Appellants have not and could not validly claim this harmed the national economy.

justify submission of, the local governments' interests. To the contrary, the interests of the local governments greatly outweigh the federal interest.

In *National League of Cities, supra*, this Court ruled that the FLSA could not be applied to the sovereign functions of state and local governments lest their ability to perform these functions be impaired. Under this holding, applicable here, the interest of the federal government in applying the FLSA is outweighed by the interest of state and local governments in connection with crucial state and local activities.

Beyond this, the imposition of the wage and hour provisions of the FLSA would dramatically increase the costs of labor-intensive mass transit. It would thereby increase the losses suffered by governmental entities in providing this service—a service which already is heavily subsidized because it already loses large amounts of money. The increased costs and losses would adversely affect the ability of governmental systems to adequately provide services essential to scores of millions of citizens. It is of great consequence that such potential for increased costs, and the consequent adverse effect upon necessary services, was an important reason why this Court struck down the federal government's attempt to impose the FLSA upon state and local activities in *National League of Cities, supra*, 426 U.S. at 846-48.

The FLSA would also impair the ability of transit systems to schedule work in a way that meets the needs of citizens. Because of rush-hour commuting patterns, public transit systems must develop innovative work schedules that balance the need for an efficient transportation system with the workers' right to fair wages and fair working hours. This is accomplished by split shifts, under which workers receive premium rates of pay because they have breaks between their operating hours.[12]

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[12] Split shift working schemes can also serve a secondary purpose of helping the public transit system include a variety of workers on

If the wage and hour provisions of the FLSA are imposed on mass transit services, local governments may have to abandon the split shift scheme, as the costs could become too high. Here again it is of great consequence that the possibility that innovative or flexible working schemes would be stifled was a major reason this Court struck down the application of the FLSA to state and local entities in *National League of Cities*. 426 U.S. at 850.

Moreover, the potential stifling of innovative or flexible schedules implicates another broad state and local interest, the interest in being free to experiment. This right is crucial to improving the efficiency of state services and its exercise is in the interest of the federal government as well as state and local governments. In the words of Justice Brandeis:

> There must be power in the states and the nation to remould through experimentation, our economic practices and institutions to meet changing social and economic needs.
>
> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). *See also Zobel v. Williams*, 457 U.S. 55, ——, 102 S. Ct. 2309, 2321 (1982) (O'Connor, J., concurring); *Chandler v. Florida*, 449 U.S. 560, 579 (1981); *Reeves, Inc. v. Stake*, 447 U.S. 429, 441 (1980).

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the payroll: certain classes of workers may find it difficult to spend long uninterrupted stretches away from home or personal obligations.

As against these important local interests, there is little to balance on the federal side. The only federal interest expressed in the FLSA is a commendable desire to assure that workers receive at least the minimum wage and fair working hours. But public transit workers receive wages three times as high as the minimum prescribed by the FLSA, and their wages are comparable with those of other city employees, construction workers, manufacturing workers, and workers in the building and printing trades. As well, they are already paid premium rates for a significant portion of their normal working hours. The working hours themselves are arranged to provide fair hours while meeting the exigencies of transit service. Finally, unlike workers for whom the FLSA is basically designed, the employees of public mass transit systems occupy a strategic bargaining position which ensures them of fair wages and hours.[13]

Nor need there be any fear that holding the FLSA inapplicable to publicly owned mass transit will result in federal regulatory power being diminished in connection with subjects on which it should prevail. There will still be many subjects where, for constitutional and practical reasons, federal power will be sustained, whether it is applied to mass transit or other state and local activities. The Constitution, for example, forbids racial and religious discrimination. No state or local government can evade this prohibition on Tenth Amendment grounds. Similarly, acting pursuant to its constitutional powers, Congress can mandate state and local compliance with laws banning discrimination by age or sex. See, *Equal Employment Opportunity Commission v. Wyoming*, —— U.S. ——, 103 S. Ct. 1054 (1983). Also, because uniform national minimums are requisite to successful efforts to stop nationally harmful air and water pollution

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[13] As stated by this Court in *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 706 (1945), the FLSA was enacted because, due to "unequal bargaining power as between employer and employee, certain segments of the population required federal compulsory legislation" regarding minimum wages and maximum hours.

and nationally harmful wastes of energy, Congress can constitutionally require adherence to laws establishing minimum antipollution standards and preventing wastes of precious energy resources. *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., supra*; *Federal Energy Regulatory Commission v. Mississippi, supra.* Thus, on these and other appropriate subjects, federal power will continue to be maintained.

III. Because of Important Constitutional Principles, Federal Funds Provided Under the UMTA Cannot Justify the Imposition of the FLSA Upon Publicly Owned Mass Transit Systems

Appellants urge that publicly owned mass transit systems should not qualify for Tenth Amendment protection because local governments used UMTA funds in acquiring or operating transit systems, and especially urge that the use of such funds to acquire systems should distinguish mass transit from other fields. Appellants' argument is erroneous for crucial constitutional reasons.

First, this Court has ruled that if Congress intends to impose conditions upon federal grants, it must state the conditions unambiguously, so that state and local governments will know the obligations they are assuming and can judge whether they nonetheless wish to accept the grants. *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981). This precept is violated by appellant's argument. The UMTA does not condition its grant monies upon compliance with the wage and hour provisions of the FLSA. To the contrary, in passing the UMTA "Congress made it absolutely clear that it did *not* intend to create a body of federal law applicable to labor relations between local government entities and transit workers." *Jackson Transit Authority v. Local Division 1285, Amalgamated Transit Union*, —— *U.S.* ——, 102 S.Ct. 2202, 2209 (1982) (emphasis supplied).[14]

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[14] The only provision of the UMTA which had any effect at all on labor relations was Section 13(c), 49 U.S.C. § 1609(c), which con-

Moreover, San Antonio acquired its transit system without the use of UMTA monies and before that act was even passed.

Second, and of even greater importance, appellants' argument will gravely impair the federal nature of our system. In claiming that the wage and hour provisions of the FLSA are applicable to publicly owned transit systems because local governments have used UMTA funds, appellants are relying on federal funding to justify displacement of state and local authority on a subject vital to state and local governments. Such a position is commonly asserted by the national government,[15] but its argument will vitiate the federal system. For the national government has a financial power vastly superior to that of state and local governments: it has an infinitely greater ability to raise money through taxation and borrowing. Because of its superior financial power, the national government grants over $80 billion annually to state and local governments; such funds are important in enabling state and local governments to fully carry out their essential sovereign functions. The granted funds are used in such crucial fields as health, education, safety, police protection and roads. They are used both for operating costs and to acquire essential capital facilities—*e.g.*, roads, schools, hospitals and public buildings. Without the funds, state and local governments would be gravely hampered in performing their sovereign duties effectively. This is no less true in regard to funds used to acquire vital facilities than in regard to funds used to operate state and local functions.

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ditions federal grants upon recognition of employees' collective bargaining rights. The inclusion of this specific condition highlights the absence of any provision under which application of the FLSA is a condition of grant monies.

[15] See *e.g.*, *Brief for Appellees, State of Connecticut, et al. v. United States, et al.*, No. 83-6159 (2d Cir. 1983), jurisdictional statement pending, No. 83-870, O. T. 1983.

Thus, if the grant of funds enables the national government to establish governing conditions in areas the Constitution otherwise commits to state and local governments, then national power will be aggrandized and state and local authority will be diminished across a broad range of critical state and local activities. Instead of power being divided among levels of government, as the Constitution contemplates, it will be centralized in the national government, as the Constitution eschews.[16] Huge federal grants for such functions as police protection, health services and park restoration did not deter this Court from precluding federal intrusion into these areas of state and local decisionmaking in *National League of Cities, supra*. Likewise, the fact of federal grants should not sanction federal intrusion upon state and local decisionmaking in other areas which are constitutionally committed to state and local governments.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision below that publicly owned mass transit systems are protected by the Tenth Amendment against application of the FLSA.

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[16] This will occur though federal grant monies, while crucial to the ability of state and local governments to fully carry out their functions, are nonetheless far below the amount of their own funds spent on vital functions by state and local governments. See, Madden, *The Constitutional Foundations of Federal Grants*, in *Federal Grant Law* 5, 6 n.3 (M. Mason, ed. 1982).